International Extradition and the Right to Bail

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The section of the U.S. Code dealing with the extradition of international fugitives has remained largely unchanged since its codification over a century and a half ago.[1] Despite the few recent failed attempts to modernize extradition law,[2] the United States still operates under a regime developed during the administration of President James Polk when countries would demand, through messages sent by sea, the rendition of fugitives who would be tracked down and apprehended, usually by marshals on horseback who would send them on the next boat home.[3] In the absence of any successful legislative initiative concerning extradition

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[1] With few changes from the Extradition Act of 1848, ch. 167, § 1, 9 Stat. 302, 303 (1848), the current extradition statute provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate . . . authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate . . . to the end that the evidence of criminality may be heard and considered. . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

18 U.S.C. § 3184 (1994).

[2] *See* Extradition Act of 1983, H.R. 2643, 98th Cong. (1983); Extradition Act of 1981, S. 1639, 97th Cong., 1st Sess. (1981).

[3] *See Extradition Act of 1981: Hearing on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong. 16 (1981) [hereinafter *1981 Hearings*]:

> The laws designed to deal with international extradition in the world of the horse and buggy and the "tall ships" simply do not meet the needs of a world in which criminals can transfer millions of dollars from one country to another in a matter of seconds and can flee half way around the world in less than a day.

Id. (statement of Michael Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice).

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in the past 150 years, federal courts (mostly federal district courts, since extradition orders are unappealable[4]) have, by necessity, developed a federal common law to fill in the gaping holes that the legislation left. This development of the common law of extradition is perhaps best exemplified in the varied and often contradictory opinions emanating from the lower courts on the subject of the availability of bail for defendants facing international extradition.

Despite the long history of this statute, relatively few cases[5] and academic articles[6] have explored the question of the requirements for granting bail in international extradition cases. In the solitary U.S. Supreme Court opinion handed down on the subject ninety-four years ago, *Wright v. Henkel*,[7] Chief Justice Fuller, writing for the Court, made passing reference to the right to bail in international extradition cases as he denied the petition for a writ of habeas corpus before the Court. His statement is the only source for the extradition judge's authority to grant bail, and until just recently, was the standard unquestioningly applied in extradition cases.[8] In the oft-quoted passage, he said:

> We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and *whatever the special circumstances*, extend that relief.[9]

This dictum planted the seeds of the current federal common law of bail in international extradition proceedings.[10] In the ninety-four years since *Wright*, federal judges have struggled to figure out whether they have authority to grant bail, in what stage of the extradition proceedings

[4] *See infra* note 62 and accompanying text. Though extradition orders are unappealable, potential extraditees can launch a collateral attack on certifications of extraditability through a petition for a writ of habeas corpus. Some treaties provide for a right of appeal to the circuit court regarding certain findings made by the extradition magistrate. *See, e.g.*, Supplementary Treaty Between the United Kingdom of Great Britain and Northern Ireland and the United States (providing for a right of appeal on the question of whether the extraditee is actually being prosecuted for a "political offense" in his home country).

[5] In addition to the recent cases of *Parretti v. United States*, 112 F.3d 1363 (9th Cir. 1997) and In re *Kirby*, 106 F.3d 855 (9th Cir. 1996), the District Court of Nevada provided a very comprehensive description of the case law regarding bail in extradition cases. *See In re* Extradition of Nacif-Borge, 829 F. Supp. 1210 (D. Nev. 1993); *see also* United States v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990).

[6] *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 692–98 (3d ed. 1996); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1447–49 (1988); Jeffrey A. Hall, Note, *A Recommended Approach to Bail in International Extradition Cases*, 86 MICH. L. REV. 599 (1987); Carl A. Valenstein, Note, *The Right to Bail in United States Extradition Proceedings*, 1983 MICH. Y.B. INT'L LEG. STUD. 107 (1983).

[7] 190 U.S. 40 (1903).

[8] *See Parretti*, 112 F.3d at 1385–6 (9th Cir., 1997) (suggesting *Wright*'s "special circumstances" standard is outdated, unconstitutional, and unintended by the Supreme Court).

[9] *Wright*, 190 U.S. at 63 (emphasis added).

[10] *See In re* Extradition of Sutton, 898 F. Supp. 691, 693–94 (E.D. Mo. 1995) ("The federal statute that governs the extradition of an individual from the United States to a foreign country . . . does not provide for bail . . . . Therefore, the Court must look to federal common law regarding extradition proceedings."); *In re* Extradition of Rouvier, 839 F. Supp. 537, 539 (N.D. Ill. 1993) ("Given the absence of statutory law governing bail in international extradition proceedings, the question is determined based on federal common law.").

they can grant it, and what "special circumstances" might justify it. Without any direction from a recent Supreme Court opinion, the lower courts have patched together a workable, if confusing and sometimes contradictory, system regarding the availability of bail to potential extraditees.

This patchwork quilt has begun to unravel in the last decade, and most significantly in the last two years, with two decisions handed down by divided panels of the U.S. Court of Appeals for the Ninth Circuit that challenged the fundamental concepts underlying the law of bail in international extradition proceedings.[11] In fact, a constitutional challenge to the extradition statute itself, which resulted in a nationwide stay of all extradition orders, has been left unresolved even though the decision was vacated for want of jurisdiction.[12] These decisions, as well as a general confusion among the district judges and magistrates hearing extradition cases, require that we reexamine, or at least systematically organize, the conflicting theories regarding the legal character of bail in extradition proceedings as well as delineate the source and extent of the authority of an extradition judge.[13] By analyzing every reported case involving bail in an extradition proceeding, this Note attempts to do just that.

Part I provides a general introduction to the history of the extradition statute. Part II describes the complex procedures involved in each stage of an extradition proceeding as they relate to bail. Part III presents a short description, by way of comparison, of the governing law for federal bail cases outside the realm of extradition law. Part IV examines the "rule" of "special circumstances" first phrased (perhaps inadvertently) in *Wright*, made prominent by a single opinion of Judge Learned Hand,[14] and developed piecemeal by federal district courts throughout the course of this century. Part V describes the legislative efforts that attempted to bring order to this confusing area of the law and provides a few suggestions for directing future legislation.

[11] *See Parretti*, 112 F.3d at 1380–85 (finding the special circumstances standard a violation of the Due Process Clause of the Fifth Amendment); *In re* Kirby, 106 F.3d 855 (9th Cir. 1996) (finding appellate jurisdiction for direct appeals from bail determinations in extradition proceedings).

[12] *See* Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), *vacated as moot*, 82 F.3d 1081 (D.C. Cir. 1996). The extradition judge in *Lobue* struck down 18 U.S.C. § 3184 (1994) because he felt that it unconstitutionally permitted the executive branch to review the legal determinations of the judiciary. *See Lobue*, 893 F. Supp. at 78. The case was vacated by the D.C. Circuit on jurisdictional grounds: Lobue's habeas petition should have been presented to the district court in the jurisdiction where he was confined, not to the judge who was hearing his extradition case. *See Lobue*, 82 F.3d at 1082–83 (D.C. Cir. 1996). The constitutional questions raised in the original *Lobue* opinion have been left unresolved. *See* Allison Marston, *Innocents Abroad: An Analysis of the Constitutionality of the International Extradition Statute*, 33 STAN. J. INT'L L. 343 (1997).

[13] As explained below, any federal judge can hear extradition cases. However, since the magistrate or federal district court judge who hears an extradition case leaves behind his Article III authority and functions more as an official performing a quasi-executive function for the State Department, I will refer to such judges as extradition judges.

[14] *See In re* Mitchell, 171 F. 289 (S.D.N.Y. 1909). As the first notable opinion to find special circumstances warranting bail, Judge Hand's opinion in this case has been quoted extensively (perhaps as much as the Supreme Court's in *Wright*) by advocates seeking bail for their clients, as well as by courts finding special circumstances warranting bail.

I. THE ORIGINS AND SCOPE OF THE EXTRADITION JUDGE'S AUTHORITY

The peculiarities of the law governing bail in international extradition cases are a direct result of the ambiguous constitutional position of the extradition judge. The rendition of international fugitives through the extradition process is essentially an executive function performed by the Secretary of State pursuant to a treaty between the United States and a foreign country.[15] However, federal judges and magistrates (possibly even state judges[16]) take off their robes as judges governed by Article III of the Constitution when they hear extradition cases and become, in essence, administrative judges under the authority of the Secretary of State. One of the central questions regarding bail in international extradition proceedings revolves around *who* the judge is when he decides the bail question: a federal judge or an executive official.

Prior to the enactment of the extradition statute in 1848, two cases laid the groundwork for the initial delegation of a portion of the executive's extradition authority to the judiciary (or at least to "judges").[17] In In re *Robbins*[18] and In re *Metzger*,[19] the claim made by those protesting the extradition was that the procedure followed by the State Department was insufficiently sensitive to the individual circumstances and rights of the accused as compared, for example, to the procedure judges follow in criminal proceedings. These two cases, as well as the first case occurring under the extradition statute, In re *Kaine*,[20] have defined the role of the extradition judge to the present day. Exhaustive summaries of these

15 *See* Yapp v. Reno, 26 F.3d 1562, 1565 (11th Cir. 1994); Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993). *But see* Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir. 1973) ("[W]hile the conduct of foreign affairs is almost exclusively an executive function, extradition has, at least in the United States . . . been generally a matter of judicial competence.").

16 The extradition statute grants the same power to certify extraditability to "any justice or judge of the United States, or any magistrate . . . authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State . . . ." 18 U.S.C. § 3184 (1994). However, I have not found a reported case from any state court that either construes 18 U.S.C. § 3184 or certifies an international fugitive as extraditable. The one federal court to research the topic came to a similar conclusion. *See In re* Mackin, 668 F.2d 122, 129–30 n.11 (2d Cir. 1981) (finding no state court case after the mid-1800s). Were state judges given this federal executive function, the constitutional status of that delegation of power may be problematic under the Supreme Court's decision in *Printz v. United States*, 117 S. Ct. 2365 (1997) (striking down federal legislation that ordered local sheriffs to do background checks for those seeking to purchase handguns as unconstitutional). Since the extradition statute is, in a sense, hijacking state resources for a federal purpose without providing any additional funding, it may tread on the unconstitutional ground of unfunded mandates set forth in *Printz*. *Printz*, 117 S. Ct. at 2380 (citing *New York v. United States*, 505 U.S. 144, 188 (1992), for the proposition that "The Federal Government may not compel the States to enact or administer a federal regulatory program"); *see also* text accompanying *infra* notes 28–34 (describing the procedural history of In re *Metzger*, a case prior to the extradition statute, which began in New York State Court).

17 *See generally* BASSIOUNI, *supra* note 6, at 35, 41–42 (describing the politically volatile extradition cases preceding the enactment of the first statute in 1848).

18 27 F. Cas. 825 (D.C.D.S.C. 1799) (No. 16,175). *See generally* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L. J. 229–30 (1990) ("[T]he battle waged in 1799 and 1800 over Jonathan Robbins should dispel any notion that the Great Compromise of the Constitutional Convention settled the proper balance of forms of government.").

19 17 F. Cas. 232 (S.D.N.Y. 1847) (No. 9511), *aff'd*, 46 U.S. (5 How.) 176 (1847).

20 55 U.S. (14 How.) 103 (1852).

cases and their importance for extradition law are available elsewhere.[21] The relevant aspect of these cases for the more specific discussion of the right to bail in extradition proceedings derives from their characterization of the judicial role. Moreover, the history of the extradition statute and its early interpretation reflects both Congress' and the courts' desire to inject at least some procedural safeguards into the process of seizing a person in the United States for transference to another country's judicial system.

In one of the earliest and certainly most famous cases arising under the 1794 Jay Treaty,[22] the United Kingdom sought the extradition of Jonathan Robbins, a U.S. citizen impressed into service on a British vessel who escaped during a mutiny that led to the deaths of two officers. After Robbins was imprisoned for six months awaiting trial, President John Adams allegedly ordered District Judge Thomas Bee to arrest Robbins and "deliver him up" to the British Consul. In what was later regarded as a miscarriage of justice, Judge Bee ordered Robbins' transference to British authorities, holding that the judge's role was not to try the accused but only to interpret the treaty, and the "justifiability" of the murders was not a factor for consideration by the judge at this stage of the proceedings.[23] Representative (and future Chief Justice) John Marshall defended President Adams' actions,[24] but "a great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison, and surrender, a fugitive . . . [and] that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary . . . ."[25] Many commentators believe that the national outcry over this perfunctory treatment led to the downfall of the Adams administration.[26] It certainly was fresh in the minds of the legislators seeking to craft a role for the judiciary in legislation dealing with extradition.[27]

A similar concern over procedural fairness underlies the case that immediately preceded the passing of the extradition statute. Once again, in *Metzger*,[28] the district court expressed its deference to the

[21] *See In re* Mackin, 668 F.2d 122, 125–27 (2d Cir. 1981) (discussing the *Metzger* and *Kaine* cases); Kaine, 55 U.S. (14 How.) at 111–13 (summarizing *Robbins* and explaining its political effects); BASSIOUNI, *supra* note 6, at 41–42.

[22] Treaty of Amity, Commerce and Navigation with Great Britain (Jay Treaty), Nov. 19, 1794, U.S.-G.B., art. XXVII, 8 Stat. 116, 129, T.S. No. 105.

[23] *Robbins*, 27 F. Cas. at 832 ("[W]e know that no man can be punished by the laws of Great Britain without a trial. If he is innocent, he will be acquitted; if otherwise, he must suffer.").

[24] *See* Speech of John Marshall, 10 Annals of Congress 613 (1800), *reprinted in* 18 U.S. (5 Wheat), app. 201, 204–05, 215 (1820).

[25] *In re* Kaine, 55 U.S. (14 How.) 103, 112 (1852); *see also In re* Metzger, 17 F. Cas. 232, 233 (S.D.N.Y. 1847) (No. 9511), *aff'd*, 46 U.S. (5 How.) 176 (1847) (pointing out that the House of Representatives expressed its approval of the procedure followed in *Robbins* by a vote of 65 to 39).

[26] *See Kaine*, 55 U.S. (14 How.) at 112 ("The assumption of power to arrest, imprison, and extrude, on executive warrants, and the employment of a judicial magistrate to act in obedience to the President's commands, where no independence existed, or could exist, had most materially aided to overthrow the administration of a distinguished revolutionary patriot . . . .").

[27] *See id.* at 112 ("That the eventful history of Robbins's case had a controlling influence . . . especially on Congress, when it passed the act of 1848, is, as I suppose, free from doubt.").

[28] 17 F. Cas. 232.

executive branch on the underlying question as to whether Nicholas Metzger, sought by France on a charge of forgery, was extraditable. "[I]f the [P]resident in his discretion determines the casus foederis of the treaty exists, and that Metzger ought to be delivered up to the French government," ruled Judge Samuel Betts of the Southern District of New York, "there is nothing shown in this case which entitles him to the interference of the judiciary, to prevent the decision of the [P]resident being carried into execution."[29] Judge Betts did, however, go through the motion of finding probable cause that Metzger committed the crimes for which he was accused by the French authorities and held that the actual seizure of Metzger could only be performed pursuant to judicial authority.[30]

When the Supreme Court eventually received the case on a putative appeal from a denial of habeas corpus relief by Judge Betts, Justice John McClean went to great pains in the majority opinion to emphasize that "[t]he case under consideration was heard and decided by the district judge at his chambers, and not in court."[31] While denying jurisdiction to hear an appeal from a habeas action, especially one heard by a district judge in chambers,[32] the Court expressed its approval for the procedure followed by both the U.S. Attorney and the district court in the case.[33] Nevertheless, the confusion of the Court was clear as it scrambled to characterize exactly what Judge Betts was doing when he ordered the arrest and then the committal of Metzger subject to the order of the executive.[34] The case brought to the fore the need for legislative action to clarify the judicial role in international extradition cases.

Congress responded to this call from the judiciary by constructing a statute substantially similar in wording to the statute in force today.[35] The statute specified that a federal judge or "commissioner" (now magistrate) *may* order the arrest of a fugitive pursuant to a complaint charging him with a crime falling under the applicable treaty in order that the judge could hear and consider evidence of such criminality. If the judge finds sufficient evidence to sustain the charge, he *shall* then certify the

[29] *Id.* at 240. Interestingly, the case originally came before a New York State magistrate judge, who ordered Metzger's arrest but was overturned on appeal "upon the ground that the judicial authorities of the state of New York [had] no jurisdiction in the case." *Id.* at 232.

[30] *See id.* at 233 ("Without inquiring into the polity of France . . . the [treaty] provision demanding the apprehension and commitment of persons charged with crimes cannot be carried into effect in this country, but by aid of judicial authority.").

[31] *Metzger*, 46 U.S. (5 How.) 176, 190 (1847).

[32] *See id.* ("[T]he court [cannot] exercise jurisdiction to examine into the cause of the commitment, under such a state of facts. . . . [The Supreme Court] can exercise no power in an appellate form, over decisions made in his chambers by a justice of this court, or a judge of the District Court.")

[33] *See id.* at 188–89 ("Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender of Metzger was made, very properly as we suppose, referred it to the judgment of a judicial officer.").

[34] *See id.* at 189.

[35] Extradition Act of 1848, ch. 167 § 1, 9 Stat. 302 (1848); *see also* BASSIOUNI, *supra* note 6, at 36 n.35 (noting that between 1848 and 1983 Congress amended the extradition statute ten times, but in no fundamentally significant way).

prisoner as extraditable to the Secretary of State and commit him to the proper jail to await the surrender to the foreign authorities.[36] In the first Supreme Court case to construe the statute, In re *Kaine*,[37] Justice John Catron's plurality opinion synthesized the turbulent history of extradition law, which produced a statute that he felt provided for "[a] judicial proceeding . . . intended to be independent of executive control, and in advance of executive action on the case."[38] With a more searching review of the claims made by the foreign government, no longer would the accused fall prey to the same rubber stamp as Jonathan Robbins (or so the Court argued). Rather than merely functioning as the deliverer of the prisoner to the Secretary of State, the judge was now an independent actor in the extradition process, concerned principally with the finding of probable cause that this fugitive committed a crime falling under the applicable treaty.

In a series of opinions following *Kaine*, however, the Attorney General made sure to emphasize that the judge hearing an extradition case "does not exercise any part of what is, technically considered, the judicial power of the United States."[39] The judge's decision is not appealable to either the circuit court of appeals or the Secretary of State.[40] And while a petition for a writ of habeas corpus is an avenue of collateral attack available to the extraditee,[41] a judgment in the extraditee's favor at the extradition hearing does not prevent the government from reinstituting proceedings on the same charge the next day before a different judge.[42] Consequently, while the judge or magistrate performs functions that at times seem identical to those in a criminal prosecution,[43] the proceeding itself is more akin to a preliminary hearing in which the judge finds probable cause to proceed with a criminal trial. In one sense, in cases of extradition, the judge is more powerful than when hearing other cases. The decision is not reviewable, save for limited habeas corpus review,

36 *See* 18 U.S.C. § 3184 (1994). The statute continues to leave undefined exactly *who* should bring the case to the extradition judge—the Secretary of State, Attorney General, or representative of the country seeking extradition. Nevertheless, the established practice has become that the Attorney General brings the case on behalf of the country seeking extradition, although technically, a foreign country could, through private counsel, bring an action in federal court. *But see Ex parte* Schorer, 197 F. 67, 69 (C.C.E.D. Wis. 1912) ("This forum has been practically nonexistent for the last thirty years."). *See* BASSIOUNI, *supra* note 6, at 655 n.28.

37 55 U.S. (14 How.) 103 (1852).

38 *Id.* at 113. Justice Catron emphasized, "In my judgment, the law is as it should be." *Id.*

39 International Extradition, 6 Op. Att'y Gen. 91, 96 (1853) (opinion of Attorney General Cushing to Secretary of State Marcy); *see also* Extradition of Trangott Muller, 10 Op. Att'y Gen. 501, 506 (1863).

40 *See Muller*, 10 Op. Att'y Gen. at 506; Collins v. Miller, 252 U.S. 364, 369 (1920); *In re* Mackin, 668 F.2d 122, 127 (2d Cir. 1981) (providing an extensive list of citations from multiple circuits, all holding that extradition orders are unappealable under U.S.C. § 1291).

41 *See* Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (discussing the nature of habeas review on an extradition charge). Of course, both the government and the prisoner can now appeal a grant or denial of the habeas petition.

42 *See* Collins v. Loisel, 262 U.S. 426, 429 (1923) (extraditee can be arrested and tried two successive times for same alleged crime); Hooker v. Klein, 573 F.2d 1360, 1365–68 (9th Cir. 1978) (no protection against double jeopardy exists nor does res judicata apply in extradition proceedings); *Mackin*, 668 F.2d at 127.

43 Deciding whether or not to grant bail is one such function.

and the lack of many constitutional protections and rules of evidence allows for a more comprehensive investigation than might be available in a criminal prosecution.[44] In another sense, however, the extradition judge continues to exercise a less than full judicial role: The actual decision in the extradition hearing does not determine the guilt or innocence of the accused, but merely assesses the probable cause that the prisoner committed the alleged crimes contained in the applicable treaty. The murkiness of the extradition judge's institutional and constitutional position is most apparent during the many stages in the extradition process when the potential extraditee petitions for bail.

II. THE AVAILABILITY OF BAIL AT EACH STAGE OF AN EXTRADITION PROCEEDING

A fugitive facing extradition petitions for bail at every opportunity: from the moment of arrest, to the hearing on extraditability, continuing to the final appeal for habeas relief, and not ceasing until the instant the fugitive is taken to the requesting country to face trial. Thus, a short description of the critical stages in the extradition process is necessary in order to understand the context of the extradition judge's decision on bail.[45]

While all extradition proceedings are superficially similar, the process in each individual case may differ based on the treaty that governs the fugitive's case.[46] Part of the problem with the federal common law of bail, and perhaps extradition generally, is that given the subtle variations in the hundred or so extradition treaties interpreted by federal courts, the precedential value of extradition decisions is more ambiguous than other federal cases. This ambiguity is compounded, especially in the bail context, because cases usually begin and end in federal district or magistrate courts, as the fugitive's attention and resources turn to the more pressing task of defending against the extradition charge itself.[47] Still further ambiguity infects the case law, since many bail decisions are made in the course of a petition for a writ of habeas corpus, wherein the fugitive seeks release by challenging the legality of his detention. At that point, the extradition judge then returns to the role of an Article III

[44] *See infra* notes 98–99. For example, the Federal Rules of Evidence and Criminal Procedure, as well as the exclusionary rules of the Fifth and Sixth Amendments, do not apply in extradition hearings. *See* Fed. R. Evid. 1101(d)(3) (stating that the rules are inapplicable to extradition); Fed. R. Crim. P. 54(b)(5) ("[R]ules . . . [are] not applicable to extradition and rendition of fugitives."); Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir. 1986) (allowing for hearsay testimony); Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984) ("The evidentiary rules of criminal litigation are not applicable.").

[45] For a more complete description of the extradition process, see BASSIOUNI, *supra* note 6, at 649–789.

[46] For example, some extradition treaties arrange for different processes depending on whether the potential extraditee is a U.S. citizen.

[47] *See* Parretti v. U.S., 112 F.3d 1363, 1380 n.21 (9th Cir. 1997) (noting that in "a pre-trial or pre-extradition hearing bail matter . . . the issue frequently becomes moot (for practical purposes, at least) before the full range of appellate procedures can be exhausted by the parties.").

judge since habeas petitions are guaranteed by the U.S. Constitution and regulated by federal statute.[48]

A. Provisional Arrest

Some extradition treaties provide for provisional arrest[49] of the fugitive before the country formally files an extradition request.[50] Provisional arrest is usually justified as necessary to capture a fugitive who presents a high risk of flight, until such time as the country formally requests extradition. For example, if a violent criminal who has successfully eluded capture appears in the United States, the time required to complete the paperwork for a formal extradition request might provide an opportunity for the fugitive to escape once again. The stage between provisional arrest and the filing of a formal extradition request presents the first opportunity for potential extraditees to request bail.

Whether U.S. law, outside of specific provisions of certain treaties, mandates a finding of "probable cause" to justify provisional arrest is an unsettled dispute in the case law.[51] However, many treaties contain clauses similar to that provided in the U.S.-Italy Extradition Treaty of 1973:

[48] *See* U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); 28 U.S.C. § 2241(a–d) (1994).

[49] The relevant statutory provision for provisional arrest pursuant to an extradition hearing, 18 U.S.C. § 3187, provides in part:

> The provisional arrest and detention of a fugitive, under sections 3042 and 3183 of this title, in advance of the presentation of formal proofs, may be obtained by telegraph upon the request of the authority competent to request the surrender of such fugitive addressed to the authority competent to grant such surrender. Such request shall be accompanied by an express statement that a warrant for the fugitive's arrest has been issued within the jurisdiction of the authority making such request charging the fugitive with the commission of the crime for which his extradition is sought to be obtained.

18 U.S.C § 3187 (1994).

[50] *See* Treaty on Extradition, U.S.-Spain, art. XI, 22 U.S.T. 738, (entered into force July 2, 1971); Treaty on Extradition, Jan. 18, 1973, U.S.-Italy, 26 U.S.T. 493 (amended in 1984 to remove language of provisional arrest); Treaty on Extradition, Jan. 6, 1909, U.S.-Fr., 22 U.S.T. 407, as amended, Feb. 12, 1970, T.I.A.S. 7075; *see also* BASSIOUNI, *supra* note 6, at 675–76 n.112 (citing treaties with provisional arrest clauses).

[51] The extradition statute provides:

> [U]pon complaint made under oath, charging any person . . . with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty . . .[the extradition judge may] issue his warrant for the apprehension of the person so charged, that he may be brought before such . . . judge . . . to the end that the evidence of criminality may be heard and considered . . . .

18 U.S.C. § 3184 (1994).

Compare Parretti v. United States, 112 F.3d 1363, 1372–78 (9th Cir. 1997) (requiring probable cause absent a provision in the treaty and rejecting the government's argument that the probable cause requirement only applied to the existence of a valid foreign warrant for the fugitive's arrest); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980) (requiring probable cause finding based on U.S.-Italy treaty provisions, but acknowledging that statute's requirements were ambiguous), *with* United States ex rel. Petrushansky v. Marasco, 325 F.2d 562, 564 (2d Cir. 1963) (stating that the mere existence of a Mexican arrest warrant justifies provisional arrest in the United States). *See also* M. Cherif Bassiouni, *Extradition Reform Legislation in the United States: 1981–1983*, 17 AKRON L. REV. 495, 522–25 (1984); Note, *Probable Cause and Provisional Arrest Under Certain Extradition Treaties:* Caltagirone v. Grant, 7 N.C. J. INT'L L. & COM. REG. 121 (1982).

> In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. . . . The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest . . . against that person, and *such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party.*[52]

The government of Italy and other countries with similar treaties with the United States must present evidence of probable cause that the fugitive committed the crimes alleged because of the United States' constitutional protection of criminals' rights under the Fourth Amendment.[53] Depending on the relevant treaty provision, however, sometimes a provisional arrest could result in the detention of a potential extraditee for as many as ninety days.[54]

Nevertheless, the quandary faced by the extradition judge and posed for the development of the case law, in general, is how, if at all, does the probable cause showing at the provisional arrest stage differ from the probable cause showing at later stages of the extradition process. The judge seems repeatedly to engage in the same inquiry: Is there probable cause to believe that the fugitive committed a crime covered by the treaty? If the inquiry is identical, then the extradition hearing appears to be a formality—for the main issue has already been decided. After all, the extradition hearing is not geared toward a finding of guilt; rather, it only asks whether sufficient cause exists for the transference of the accused for trial in a foreign jurisdiction. If the inquiry is different (a notion unexplored in the case law), then perhaps there is a different level of proof required to justify each stage of the fugitive's detention. This standard of proof may also govern the decision as to the required showing for granting bail.[55]

Though no court has specified it as such, the probable cause showing at the stage of provisional arrest is what might be termed a "second order" probable cause showing. The government is establishing *probable cause that probable cause of criminality will be established* at the extradition

[52] Treaty of Extradition, Jan. 18, 1973, U.S.-Italy, art. XIII, 26 U.S.T. 493, 502 (emphasis added); *see generally* BASSIOUNI, *supra* note 6, at 677 (describing the need for urgency and some kind of probable cause showing).

[53] *See Caltagirone*, 629 F.2d at 742, 747; Sahagian v. United States, 864 F.2d 509, 511 (7th Cir. 1988).

[54] *See* BASSIOUNI, *supra* note 6, at 684.

[55] The most recent decision regarding probable cause at the stage of provisional arrest, *United States v. Parretti*, 112 F.3d 1363 (9th Cir. 1997), applied, for the first time, the constitutional standard and precedent of the Fourth Amendment's protection that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." U.S. CONST. amend. IV; *see Paretti*, 112 F.3d at 1377. Consequently, the panel ruled that 18 U.S.C. § 3184 "violates the Fourth Amendment to the extent it authorizes the issuance of 'provisional arrest' warrants without independent judicial determination of probable cause." *Paretti*, 112 F.3d at 1378. This decision was all Giancarlo Paretti needed, however, before he fled once again to avoid the long arm of the French court which sought his capture in the United States. *See* John Gibeaut, *Hard to Say Goodbye: Courts Refuse to Rubber-Stamp Extradition Requests*, A.B.A. J., Apr. 1998, at 28.

hearing. To justify the apprehension and detention of the accused, the judge considers the probability that "sufficient evidence will exist" at the eventual hearing to justify the delivery of the accused to the requesting government.

B. Confinement Before and During the Extradition Hearing

Most of the case law on the availability of bail in extradition hearings concerns the period between the filing of a formal extradition request and a determination of the alleged fugitive's extraditability. During this period, the extradition judge hears testimony and receives evidence authenticating the necessary documents required by the applicable treaty, establishing the identity of the individual sought, and establishing probable cause that the prisoner committed the crimes alleged.[56] It is, as noted above, more like a preliminary hearing than a trial seeking to prove guilt or innocence.[57]

The function of the extradition hearing, according to the governing statute, is to "hear evidence of criminality" and for the extradition judge to determine whether there exists "evidence sufficient to sustain the charges under the proper treaty or convention. . . ."[58] This determination would not seem to differ substantially, at least as a legal matter, from that described in the preceding section. In practice, of course, the probable cause required and the quantity of evidence weighed at the general hearing is much more substantial than at the provisional arrest stage. One might say that what constitutes probable cause at each stage of the proceedings depends on the expectations the judge has as to what evidence could be available to the U.S. Attorney presenting the government's case. In other words, one probably would not expect a detailed description of the evidence pointing toward the guilt of the accused in the telex received by the State Department before a provisional arrest hearing.[59] Conversely, the time elapsed between either the provisional

[56] *See* BASSIOUNI, *supra* note 6, at 703. Related to these requirements are the findings that the fugitive is not being prosecuted for a "political offense" and that the crime charged is one that is illegal in both the extraditing and host countries (the so-called rule of "double criminality"). *See id.* at 388–93.

[57] *See* Benson v. McMahon, 127 U.S. 457 (1888):

> [The extradition proceeding is of] the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

Id. at 463; *see also* Cherry v. Warden, 1995 WL 598986, at *3 (S.D.N.Y. 1995) (comparing certification of extradition to granting of a search warrant).

[58] 18 U.S.C. § 3184 (1994).

[59] Yet this seems to be the emerging standard in the Second and Ninth Circuits. "[T]hough . . . the provisional arrest and extradition proceedings must differ in some way, the difference does not lie in the requirement of probable cause." Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980), *quoted in Parretti*, 112 F.3d at 1376 (rejecting the government's argument that the provisional "arrest must be arranged with haste to avoid further flight" and therefore not all the documents needed in a probable cause hearing should be required for the provisional arrest); *see also Paretti*, 112 F.3d at 1377.

arrest or formal request and the extradition hearing raises the expectations of the extradition judge as to what evidence will, at that point, be available to the U.S. Attorney pursuing the case.

In addition to hearing evidence of the fugitive's criminal conduct that gave rise to the extradition request, the extradition judge will also consider defenses against extradition provided by the relevant treaty, statutes, or the common law of extradition. The judge will, for example, inquire into whether the individual is being prosecuted for a political offense,[60] and whether the alleged crimes are outlawed in both the United States and the requesting country. If such defenses prove unavailing, there is sufficient evidence to warrant a finding of extraditability, and the requisite documents required by the treaty have been provided, the fugitive is, at this point, usually remanded to custody before pursuing the final avenue of appeal: a petition for a writ of habeas corpus.[61]

C. Extradition, Bail, and Habeas Corpus

The confusion over the role of the extradition judge is compounded by the fact that extradition cases generally, and bail determinations in particular, often "spill over" into the federal judge's authority to issue writs of habeas corpus. Since certifications of extraditability are not directly appealable, an extraditee's only avenue for review of the extradition judge's adverse determination (as to both the final extradition order and the determination regarding bail) is by way of a petition for a writ of habeas corpus.[62] Most of the published decisions in this area, in fact, arise from district courts considering habeas appeals from a magistrate's finding of extraditability. The nature of habeas review on an extradition appeal is different than other cases, however, and the relationship between habeas review and bail determinations in extradition cases highlights the unique legal position of the extradition judge.

Through a habeas petition, the prisoner challenges the legality of his detention or conviction by arguing that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States."[63] Among other claims, the petitioner sometimes will allege that the factfinder at trial convicted the petitioner (i.e., determined his guilt) with evidence judged by a lower standard than "beyond a reasonable doubt" and therefore violated his rights secured by the Fourteenth Amendment.[64] Such an

60 For a detailed description of the difficult concepts involved in the political offense exception, see Manuel R. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962); Michelle N. Lewis, *The Political-Offense Exception: Reconciling the Tension Between Human Rights and International Public Order*, 63 GEO. WASH. L. REV. 585 (1995); Steven Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L. J. 247, 250 (1982).

61 The same standards of bail availability for pre-hearing confinement seem to apply to the period between certification of extraditability by the extradition judge through the exhaustion of all appeals. *See* United States v. Williams, 611 F.2d 914 (1st Cir. 1979).

62 *See In re* Mackin, 668 F.2d 122, 128 (2d Cir. 1981). The government, of course, may refile the extradition request in front of another judge if it loses its case. *See supra* note 40.

63 28 U.S.C. § 2241(c)(3) (1994).

64 *See* Jackson v. Virginia, 443 U.S. 307 (1979) (citing *In re* Winship, 397 U.S. 358 (1970)).

argument is unavailable in the extradition context, however, since the extradition judge makes no conclusions as to the guilt or innocence of the accused,[65] and evidence necessary for extradition is merely "competent evidence to establish reasonable grounds . . . not necessarily evidence competent to convict."[66] Neither the Federal Rules of Evidence nor constitutional protections, such as the protection against double jeopardy, apply in extradition cases;[67] hence, normal habeas review would, in theory, preclude every extradition based on the lack of traditional due process in the commitment of the accused.

In the extradition context, therefore, the courts have expressly limited the extent of the review of the certification proceedings.[68] In an early and often cited opinion for the Supreme Court, Justice Oliver Wendell Holmes set forth the standard for review for habeas appeals in extradition matters:

> That writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. . . . [*H*]*abeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.[69]

As the appellate cases reviewing these petitions suggest, however, the reviewing court is not a mere rubber stamp, although virtually no habeas petitions are granted in extradition cases. Rather, the district court considering a habeas petition from a potential extraditee (and the appellate court reviewing an appeal from that decision) usually investigates the legal issues involved in the extradition hearing, such as whether the crime falls within the relevant treaty or whether the prisoner is being prosecuted for a political offense, while scouring the record to make sure evidence of probable cause existed.

This foray into a seemingly peripheral area of extradition law is necessary for the present inquiry regarding bail because it is unclear whether courts are exercising their habeas authority when they grant bail petitions. As the next section elucidates, the bail statutes do not include or in any way refer to extradition cases, and the Federal Rules of Criminal Procedure do not apply. In the absence of statutory authority, then,

65 *See* Collins v. Loisel, 259 U.S. 309, 314–15 (1921).

66 Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (Holmes, J.).

67 *See* Hooker v. Klein, 573 F.2d 1360, 1367 (9th Cir. 1978).

68 For opinions that distinguish general habeas cases from habeas appeals of extradition orders, see Valencia v. Limbs, 655 F.2d 195, 197 (9th Cir. 1981); Merino v. United States Marshall, 326 F.2d 5, 11 (9th Cir. 1963).

69 Fernandez v. Phillips, 268 U.S. 311, 312 (1925); *see* United States *ex rel.* McNamara v. Henkel, 226 U.S. 520, 524 (1913). For a more recent explication of the extent of review, see Bozilov v. Seifert, 983 F.2d 140, 142 (9th Cir. 1992) (noting that habeas review includes only a judgment as to whether the original court had jurisdiction, offense is within the treaty, and "any evidence supported a determination that there was reasonable grounds to believe the accused guilty of the crime").

from where does the extradition judge get his power to grant bail? There are only two conceivable sources of authority: (1) the Court's weak declaration quoted above in *Wright v. Henkel*, or (2) the powers of a federal judge to hear petitions for writs of habeas corpus.[70]

Indeed, the similarities between a grant of bail and the issuance of a writ of habeas corpus are attractive—both lead to the freedom of the petitioner. However, as one judge noted in the face of the government's attempt to recharacterize a bail ruling favorable to the fugitive as a "constructive habeas petition":

> Bail and habeas corpus are, very obviously, two different animals. Habeas springs from the Constitution and is a constitutional right. . . . [B]ail is ruled by statute.
>
> . . . In habeas, a petitioner challenges the legality of his detention. . . . Bail says nothing as to the legality of the confinement; it simply says that confinement is not necessary in order to assure the putative prisoner's presence at a trial . . . .
>
> Habeas requires an exhaustion of all avenues of review. . . . Bail can be granted on immediate application to the judge exercising authority over the prisoner.[71]

The locus of the court's authority to grant bail is directly related to the eligibility of the case for review, as well as to the applicable standard of review for an extradition judge's bail determination.[72] Courts will often convert an appeal from an adverse (i.e. pro-government) decision on bail into a habeas petition.[73] But if the bail decision is effectively a decision deriving from the court's habeas powers, it would then appear that the government has no recourse to appeal from a bail ruling favorable to the accused. In other words, since habeas relief is only available to those whose *corpus* needs liberating, it would seem odd to grant the

[70] One might add to this list the inherent power of judges to grant bail or some provision in the local rules of a circuit regarding a magistrate's power to grant bail. *See* Principe v. Ault, 62 F. Supp. 279, 281 (N.D. Ohio 1945) (discussing that "the power to admit to bail is incident to the power to hear and determine the case"). In an English case, *Queen v. Spilsbury*, 2 Q.B.D. 615 (1898), *cited in Wright*, 190 U.S. at 63, as well as many of the earlier cases dealing with the issue, the court argued that it had "independently of statute, by the common law, jurisdiction to admit to bail." *Id.*

[71] *In re* Kirby, 106 F.3d 855, 866 (1996) (Noonan, J., dissenting). Another notable quote: "Even if one could make a silk purse out of a sow's ear, one could still not transform a sow into a cat. The two animals here [bail and habeas] cannot be conflated or confused." *Id.*

[72] Only one court has ventured to guess what standard of review should apply for a review of bail determinations. *See In re* Russell, 647 F. Supp. 1044, 1047 (S.D. Tex. 1986). Instead of applying the principles of normal habeas review, the judge in *Russell* applied the same logic to the bail hearing that courts do for review of extradition matters generally. The judge reformulated Justice Holmes' three-prong test noted above so that it asked whether the magistrate had jurisdiction to rule on bail, whether the offense charged was within the treaty, and "whether there were reasonable grounds for the Magistrate's findings ordering no bail . . . ." *Id.* Some appellate courts have reviewed a lower court's determination of whether special circumstances exist warranting bail under an "abuse of discretion" standard. *See* Parretti v. United States, 112 F.3d 1363, 1381 (9th Cir. 1997); *In re* Smyth, 976 F.2d 1535, 1535 (9th Cir. 1992).

[73] *See* Kin-Hong v. United States, 926 F. Supp. 1180, 1184 (D. Mass. 1996) (concluding that "bail decisions in an extradition proceeding could only be challenged by a writ of habeas corpus" and converting Kin-Hong's bail petition to a habeas petition); *see also In re* Siegmund, 887 F. Supp. 1383, 1385 (D. Nev. 1995) (construing appeal from detention order as a habeas petition).

government the right to habeas-type review of a bail ruling which already freed the prisoner.

It was this question that set off fireworks last year in the battling opinions of the Ninth Circuit panel hearing of In re *Kirby*.[74] In that case, the government appealed from a favorable bail ruling for three suspected IRA terrorists who broke out of the Maze prison in Northern Ireland. The two judges who agreed to accept jurisdiction on the appeal found that bail hearings were appealable final judgments of district courts under 28 U.S.C. § 1291.[75] Judge John Noonan, arguing vociferously and persuasively, if unsuccessfully, in dissent, reminded the majority that the extradition judge is not acting in the role of a federal district court judge when hearing extradition appeals.[76] Moreover, since the government can reopen or relitigate any extradition case, no extradition decision, let alone a bail determination, can actually be called "final" within the meaning of 28 U.S.C. § 1291.[77] The majority in *Kirby* also noted that indeed, some extradition decisions under the Supplementary Extradition Treaty with the United Kingdom are appealable, since that treaty uniquely allows for appeal on the question of racial or religious persecution.[78] Since this question would likely be raised on appeal in the actual extradition case, the government's right to appeal the bail determination at this early stage, the majority reasoned, should also exist.[79]

III. THE RIGHT TO BAIL: COMPARING EXTRADITION HEARINGS TO OTHER TYPES OF CASES

While establishing the extradition judge's authority to grant bail, the Supreme Court opinion in *Wright v. Henkel* also created a presumption against bail in extradition cases.[80] This presumption cuts against the grain of U.S. statutory and constitutional law, which has emphasized that "liberty is the norm, and detention prior to trial or without trial is the

74 *In re* Kirby, 106 F.3d 855 (9th Cir. 1997).

75 *See* 28 U.S.C. § 1291 (1994); *Kirby*, 106 F.3d at 858–63.

76 *See id.* at 866 (Noonan, J., dissenting); *see also In re* Ghandtchi, 697 F.2d 1037 (11th Cir. 1983), *vacated as moot*, 705 F.2d 1315 (11th Cir. 1983) (affirming district court's denial of jurisdiction to hear government's appeal from bail ruling by magistrate).

77 *See Kirby*, 106 F.3d at 866.

78 *See* Supplementary Extradition Treaty, June 25, 1985, U.S.-U.K.-N. Ir., art. 3, *reprinted in* S. Exec. Rep. No. 17, 99th Cong., 2d Sess. 16 (1986). On the difficult issues involved in the supplementary treaty, see Daniel T. Kiely, Jr., Note, *The Compromise Between Outrage and Compassion: Article 3(a) and In re* Requested Extradition of Smyth, 30 CORNELL INT'L L. J. 587(1997).

79 *See Kirby*, 106 F.3d at 862–63. The majority also made an interesting argument comparing their grab of jurisdiction without statutory authority to a district court's grab of power when it orders release on bail (a power not provided for in any statute even if recognized by the Court in *Wright*):

> If judges cannot act without explicit statutory authority, then the district judge had no authority to grant bail in the first place. But if the district judge had the authority to grant bail, as *Wright v. Henkel* recognizes, it follows that an explicit statutory grant of authority is not, in every case, a necessary prerequisite for judicial action.

Id. at 860.

80 *See* Beaulieu v. Hartigan, 554 F.2d 1, 2 (1st Cir. 1977); Salerno v. United States, 878 F.2d 317, 317 (9th Cir. 1989) (citing Wright v. Henkel, 190 U.S. 40, 63 (1903)).

carefully limited exception."[81] A generalized presumption, such as that articulated in *Wright*, creates a situation where "even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense."[82] Yet foreign policy concerns present what is perhaps the paradigmatic "compelling state interest" for the narrowing or cabining of guarantees in the Bill of Rights.[83] The fulfillment of the U.S. government's obligations to its treaty partners, and the reciprocal dangers involved in breaching extradition treaties, provide such compelling justifications for the pretrial detention and swift surrender of international fugitives.[84]

A. Constitutional Protections of the "Right" to Bail

The only place bail is mentioned in the Constitution is in the Eighth Amendment. Though that amendment provides a constitutional protection against "excessive bail,"[85] strangely enough, the Court has not inferred from that phrase a generalized right to bail itself.[86] "[T]he Eighth Amendment," one court explained, "contains nothing which prohibits the state from denying bail completely in appropriate cases."[87] Neither the history of that amendment[88] nor the Supreme Court's subsequent interpretive opinions[89] suggests anything beyond the right to be free from excessive bail when bail is explicitly provided by statute.

Only recently has a court unearthed a constitutional right to bail, finding it in the Due Process Clause of the Fifth Amendment, in the context of an international extradition case. In *Parretti v. United States*, a two-judge majority of the Ninth Circuit held that "until such time as an

81 United States v. Salerno, 481 U.S. 739, 754 (1987).

82 Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

83 *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (justifying internment of Japanese-Americans during World War II).

84 *See* United States v. Messina, 566 F. Supp, 740, 744 (E.D.N.Y. 1983) ("[C]lasses of detained persons can be denied the right [to bail] when there is reason to do so.... And clearly, foreign affairs concerns of the type noted in Wright v. Henkel can provide such reason.").

85 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

86 *See* Carlson v. Landon, 342 U.S. 524, 545–46 (1952).

87 Meechaicum v. Fountain, 537 F. Supp. 1098, 1099 (D. Kan. 1982); *see also* Howe v. Cronin, 458 F. Supp. 157, 158 (D. Col. 1978) ("[T]he Eighth Amendment... has never been held to apply to all types of proceedings.... Appeals from the denial of a habeas corpus petition are simply not proceedings to which the Eighth Amendment applies."). *But see* United States *ex. rel.* Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972) (finding "no constitutional distinction between requiring excessive bail and denying bail altogether in the absence of legitimate reasons").

88 *See Carlson*, 342 U.S. at 545 ("The Bail Clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail should not be excessive in those cases where it is proper to grant bail."); William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 89 (1977). *But see* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965 (1965) ("[T]he particular form in which the bail question appears in the Constitution is the result of an historical accident, and... the most plausible resolution of this constitutional riddle is to find an intention to grant such a right [to bail].").

89 *See* United States v. Salerno, 481 U.S. 739, 754 (1987); *cf.* Stack v. Boyle, 342 U.S. 1, 3 (1951).

individual is found to be extraditable, his or her Fifth Amendment interest trumps the government's treaty interest unless the government proves to the satisfaction of the district court that he or she is a flight risk."[90] The court's holding may have dramatic implications for the law of bail both within and beyond the extradition context. As explained below, this new standard would, for all practical purposes, overturn the ninety years of case law interpreting what types of special circumstances warrant the granting of bail.[91]

The *Parretti* court provided only a cursory description of the foundation for this new right emanating from the Fifth Amendment's guarantee that "Congress shall not deprive anyone of . . . liberty . . . without due process of law."[92] From the language of the court's holding quoted above, it seems that this right is one founded on grounds of substantive due process, i.e., that the right to be free on bail when one does not pose a flight risk is one found in the concept of ordered liberty, similar to a right to privacy.[93] For this proposition the court cited cases generally referring to a person's "'core' liberty interest in being free from bodily restraint."[94] As in the controversial abortion or freedom of contract cases, the argument here is that this right, though undefined, is implicit in the protections enumerated in the Bill of Rights, or it is such a fundamental part of our conception of liberty that no process, however due, could invade such a right.[95]

In support of the majority opinion in *Parretti*, however, one could point to the Supreme Court's decision in *United States v. Salerno*,[96] which upheld the provisions of the Bail Reform Act of 1984 allowing for pretrial detention of criminals believed to be dangerous. Though he ultimately rejected a categorical rule barring pretrial detention of

[90] 112 F.3d 1363, 1384 (9th Cir. 1997).

[91] *See id.* at 1390 (Reinhardt, J. concurring) ("In the absence of a factual showing that a potential extraditee is a flight risk, or that he is a danger to the community, the Due Process Clause requires release on bail—not the application of a special circumstances test.").

[92] U.S. CONST., amend. V.

[93] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding the right to acquiring contraceptive information within the substantive due process right of privacy).

[94] *Parretti*, 112 F.3d at 1384 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

[95] Why the court chose to take the more "legislative" route and inject a new right into the liberty clause of the Fifth Amendment may perhaps derive from the Rehnquist Court's unwillingness to expand the conception of what constitutes "due process" itself. *See, e.g.*, Moran v. Burbine, 475 U.S. 412 (1986) (finding that an accused does not have right to know that his attorney was trying to contact him); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) (Due Process Clause adds nothing to the Sixth Amendment's right to counsel). Indeed, a more expansive reading of "procedural due process" would seem to be fertile ground for the argument advanced in *Parretti*. After all, no one can question that the individual detained pursuant to his extradition hearing is deprived of liberty. The question as to why he is there would seem to be one of process: What standards should be applied to justify the accused's detention? To the degree that the special circumstances standard forces the detainee to prove more than is constitutionally required to gain his liberty, the standard forces upon him a process that is undue. *See generally* Ronald J. Allen, *Procedural Due Process of Law, Criminal*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 84 (Supp. 1990) (describing the Court's expansion and then retraction of the conception of procedural due process).

[96] 481 U.S. 739 (1987).

dangerous criminals, Chief Justice Rehnquist's majority opinion "freely conceded" to the "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. . . . [B]ut we think that these cases show a sufficient number of exceptions to the rule."[97] As the *Parretti* court suggested, it would offend our conception of justice and a fair trial to allow for commitment for several months or years of a peaceful person who poses no flight risk.[98] Though there are no explicit guarantees in the Constitution relating to a right to bail or even the conditions under which it must be granted, the vague and elastic conception of fundamental fairness the courts sometimes recognize would seem to dictate that an accused criminal should not be detained for trial unless detention is the only means to secure his future presence or to fulfill the requirements of some other compelling state interest.

B. The Statutory Right to Bail

One of the difficulties confronting anyone trying to search for guidance on the topic of bail in extradition matters is the fact that no statute ever mentions the two together. As noted above, the 150-year-old extradition statute makes no provision for bail, and neither of the major statutes dealing with bail—the Bail Reform Act and the Federal Rules of Criminal Procedure[99]—provides any hint as to how to handle bail requests in extradition cases.[100] A brief discussion of the right to bail in nonextradition settings is warranted, however, in order to show the courts' radical departure from federal law (albeit justified by compelling foreign policy needs) in extradition cases.

In federal criminal cases, there is a presumption favoring bail.[101] The Bail Reform Act does not apply to extradition cases, however, since the statute only applies to "individuals charged with committing crimes within the United States."[102] Under the Bail Reform Act of 1984, the purpose of a detention hearing is "to determine whether any condition or combination of conditions set forth in [18 U.S.C. § 3141(c)] *will reasonably assure the appearance of the person* as required and the safety of any

97 United States v. Salerno, 481 U.S. at 749.

98 *See* Hall, *supra* note 6, at 614 ("To imprison a defendant (who cannot show 'special circumstances') in the name of national interests when the defendant presents no perceptible risk to those interests (because he poses practically no risk of flight) smacks of a punitive restraint, proscribed by the due process clause.").

99 Federal Rule of Criminal Procedure 54(b)(5) specifically states that the rules "are not applicable to extradition and rendition of fugitives." FED. R. CRIM. P. 54(b)(5). *But cf.* Rice v. Ames, 180 U.S. 371, 375 (1901) (extradition proceedings are "cases of a criminal nature").

100 *See In re* Nacif Borge, 829 F. Supp. 1210, 1213 (D. Nev. 1993); United States v. Taitz, 130 F.R.D. 442, 444 (S.D. Cal. 1990). Nor do the rules of civil procedure apply to extradition matters. *See* Merino v. United States, 326 F.2d 5, 12–13 (9th Cir. 1963), *cert. denied*, 377 U.S. 997 (1964). Also, the Federal Rules of Evidence specify that they are not applicable to "proceedings for extradition or rendition." FED. R. EVID. 1101(d)(3).

101 *See* United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985) (describing the presumption in favor of bail in nonextradition cases).

102 Kin Hong v. United States, 926 F. Supp. 1180, 1185 (D. Mass. 1996), *rev'd*, United States v. Kin Hong, 83 F.3d 523 (1st Cir. 1979).

other person and the community."[103] The magistrate can consider the following factors in determining whether and how much bail is warranted:

1. the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
2. the weight of the evidence against the person;
3. the history and characteristics of the person, including—
   (A) [the person's] character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
   (B) whether, at the time of the current offense or arrest, [the person] was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State or local law; and
4. the nature and seriousness of the danger to any person or the community that would be posed by the person's release. . . .[104]

A magistrate's finding that "no condition or combination of conditions will reasonably assure the safety of any other person and the community" must be supported by clear and convincing evidence,[105] and a finding that no condition or combination of conditions will reasonably assure the appearance of the person as required need only be supported by a preponderance of the evidence.[106]

As noted in Part IV, courts have manufactured a dramatically different set of criteria by which they would find sufficient grounds (or "special circumstances") to grant bail. The Bail Reform Act targets only two classes of people for pretrial detention: those who pose a risk of flight, and those who will endanger "the safety of any other person or the community."[107] In contrast, the bail decisions in the extradition context specify only those people who can receive bail: those who are not a flight risk *and* can prove that special circumstances exist in the instant case to warrant bail.

[103] 18 U.S.C. § 3142(f) (1994) (emphasis added).

[104] *Id.* § 3142(g).

[105] *Id.* § 3142(f).

[106] *See* United States v. Vortis, 785 F.2d 327, 328–29 (D.C. Cir. 1986); United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 405–06 (2d Cir. 1985); United States v. Orta, 760 F.2d 887, 891 (8th Cir. 1985).

[107] 18 U.S.C. § 3142(f) (1994).

IV. THE CRITERIA FOR BAIL IN U.S. EXTRADITION HEARINGS

The case law regarding the criteria for pretrial release in extradition cases has been, to say the least, inconsistent. There is even significant disagreement as to whether extradition judges are, in general, granting most bail requests in their cases.[108] Part of the difficulty in assessing any trends, both as to the availability of bail and to the circumstances that warrant bail, is that many bail decisions by U.S. magistrates go unreported, and those that are reported often do not apply the special circumstances test described below or give reasons for their decisions.[109] The data presented in Table I and the Appendix should be viewed in this light. The Appendix provides a systematic description of all reported cases in which the judges explained their rulings on bail. The data provides some insight into the lack of consistency in extradition judges' rulings on bail, as well as the arguments available to those seeking to present circumstances sufficiently special to warrant prehearing release.

TABLE I. *The Availability of Bail to International Fugitives in American Extradition Proceedings*[110]

Year	Total			Foreign Nationals			U.S. Citizens		
	Arrested	Granted Bail	Granted Bail (%)	Arrested	Granted Bail	Granted Bail (%)	Arrested	Granted Bail	Granted Bail (%)
1980	45	17	37.7	33	11	33.3	12	6	50.0
1981	53	13	24.5	37	6	16.2	16	7	43.8
1982	51	14	27.5	33	6	18.2	18	8	44.4
Total	149	44	29.5	103	23	22.3	46	21	45.7

108 *Compare* Beaulieu v. Hartigan, 430 F. Supp. 915, 916 (D. Mass. 1977) ("In the more recently reported cases, granting of bail pending completion of the extradition proceedings has been the rule rather than the exception."); United States v. Smyth, 795 F. Supp. 973, 975 (N.D. Cal. 1992) ("The practice of the district courts has been to release persons provisionally arrested awaiting the filing of formal extradition charges."); 1977 DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW 156 ("In general it is the practice of United States Courts to allow persons provisionally arrested to remain at large on bond if there is no evidence that the person is about to flee."), *with* BASSIOUNI, *supra* note 6, at 697 ("The Government, in all cases since 1980, has taken the position that bail is the exception and not the rule, and its policy is to oppose granting it. . . . Thus, the trend toward liberality that seemed to develop in the 1970's was reversed in the 1980s."); telephone conversation with Sara Criscitelli, U.S. Department of Justice, Criminal Division, July 28, 1997 ("[T]he majority of extraditees do not receive bail.").

109 *See* BASSIOUNI, *supra* note 6, at 694–95 n.164 (citing 11 cases where the special circumstances rule was ignored in the opinion of the extradition judge granting bail); Kester, *supra* note 6, at 1448 n.43 (listing 10 cases where bail was granted without discussion).

110 Source: *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong. 42–43 (1983) [hereinafter *1983 Hearings*] (Statement of Richard Olsen, Deputy Assistant Attorney General, Criminal Division, Department of Justice). Note that this data only includes cases in which an arrest was needed and able to be performed. Mr. Olsen noted that until the 1970s, "it was a rare year that the Criminal Division handled more than ten extradition requests to the United States," but that in 1979 the Department of Justice "opened" 127 extradition cases, and in 1982, 338 cases. *Id.* at 34. Unfortunately, more recent data is not available, though we know that the number of extradition requests increases with the number of extradition treaties into which the United States enters. The proliferation of new countries and U.S. allies in the 1990s has assured a growing supply of extradition requests in recent years and for the near future.

A. Wright v. Henkel *and its Early Progeny*

In *Wright v. Henkel*,[111] the Supreme Court was considering an appeal from a denial of habeas corpus relief in which Whitaker Wright, a citizen of the United States, sought release pending his extradition hearing. The British government sought Wright for prosecution on charges of corporate fraud.[112] Despite Wright's claims that he had bronchitis, which might develop into pneumonia were he confined, the extradition judge decided that no power existed for allowing Wright bail and rejected the petition.[113] The questions posed to the Supreme Court were whether an extradition judge had the power to grant bail, and if so, from where does such a power derive. The Court gave a partial answer to the first question and ignored the second.

In the same breath as it declared that it was "unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail . . . whatever the special circumstances," the Court said that it was not being called upon to do so since this was a case where a denial of bail was warranted.[114] The Court noted that the statute specified that upon a finding of extraditability (i.e., post-hearing) the judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."[115] Moreover, "the same reasons which induced the language used in the statute would seem generally applicable to release pending examination."[116] At best, one can say that the Supreme Court left the issue of bail availability in extradition cases for another day. Unfortunately, that day has yet to arrive, and the lower courts have flailed about to define what types of "special circumstances" the Court might agree warrant a granting of bail.

In many respects, the federal common law of bail in extradition cases is more a product of the pen of Learned Hand than the dicta of the

[111] 190 U.S. 40 (1903).

[112] Specifically, the allegations against Wright, who was formerly the director of the London Globe and Finance Company, were that he "ma[de], circulate[d], and publish[ed] certain reports and statements of accounts of the said corporation, which were false . . . with the intent thereby to deceive and defraud the shareholders or members of the said corporation." *Id.* at 42.

[113] *See id.* at 43.

[114] *Id.* at 63. The Court did not elaborate on why Wright, who was being sought on a charge of a nonviolent crime, should not be admitted to bail.

[115] *Id.* at 62 (quoting § 5270 of the Revised Statutes, the wording of which has remained unchanged even in the current extradition statute, *see* 18 U.S.C. § 3184 (1994)).

[116] *Id.* Those reasons, explained the Court, were based on the foreign policy interests of the United States:

> The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

Id.

Supreme Court. In his oft-quoted, early opinion in In re *Mitchell*,[117] one of the first extradition cases interpreting *Wright*, Judge Hand granted bail to a potential extraditee sought on charges of larceny by the Canadian government. The "special circumstance" warranting bail was Mr. Mitchell's need to consult with counsel in a civil suit "upon which his whole fortune depend[ed]."[118] Perhaps more important than its holding that participation in other litigation would constitute a special circumstance,[119] Judge Hand explicitly pointed to the decision in *Wright* as the only source for the extradition judge's power to grant bail.[120] By opening the door of special circumstances to include participation in civil litigation (a relatively small inconvenience in the scheme of hardships befalling those imprisoned during extradition hearings), Judge Hand presented a context for the evolution of the common law of bail in extradition cases.[121]

B. The Modern "Special Circumstances" Standard

Many commentators have expressed disapproval and confusion regarding the "special circumstances" standard.[122] One judge has gone so far as to declare that "the Supreme Court plainly did not hold that

[117] 171 F. 289 (S.D.N.Y. 1909).

[118] *Id.* at 290. Interestingly, of the many cases citing Judge Hand's opinion, none has recognized that Mitchell was released on bond only for a period "limited strictly to the period of that suit." *Id.* Afterwards he was returned to the Tombs Prison. Moreover, the circumstances seemed particularly "special" in *Mitchell* since Mitchell was arrested on the extradition charge the day before his civil trial was to begin. *See id.*

[119] Indeed, a remarkable number of potential extraditees have attempted (without success) to take advantage of a similar "civil litigation" special circumstance. *See, e.g., In re* Russell, 805 F.2d 1215 (5th Cir. 1986); United States v. Glantz, 1994 WL 168019 (S.D.N.Y. 1994); United States v. Hills, 765 F. Supp. 381 (E.D. Mich. 1991); Koskotas v. Roche, 740 F. Supp. 904 (D. Mass. 1990).

[120] *Mitchell*, 171 F. at 290 (noting that "the right to take bail . . . must depend entirely upon Wright v. Henkel . . . ."). Judge Hand reiterated, however, that the power to admit to bail "should be exercised only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory." *Id.* at 289.

[121] Judge Hand's opinion stands out among the early cases because of his invocation of the special circumstances doctrine. While the court in In re *Gannon*, 27 F.2d 362 (E.D. Pa. 1928), found jurisdiction and cause to grant bail based on the likelihood of delay and the fact that the offense was bailable in both the country seeking extradition and in Pennsylvania, it did not apply the special circumstances doctrine as such. The same is true of the court in *McNamara v. Henkel*, 46 F.2d 84 (S.D.N.Y. 1912), which denied bail and suggested that "admission and extradition to bail should be in practice an unusual and extraordinary thing [in extradition matters], for the whole proceeding is opposed to our historical ideas about bail." *Id.*

[122] *See 1981 Hearings*, *supra* note 3, at 22 (statement of Prof. M. Cherif Bassiouni, School of Law, DePaul University) ("Special circumstances have been the source of a great problem in judicial interpretations applying this standard."); Hall, *supra* note 6, at 599 ("The amorphous 'special circumstances' standard has resulted in an incoherent approach to bail in international extradition cases."); Beaulieu v. Hartigan, 430 F. Supp. 915, 917 (D. Mass. 1977), rev'd, 553 F.2d 92 (1st Cir. 1977) ("[T]he 'special circumstances' doctrine of *Wright*, though still viable, must be viewed, in light of modern concepts of fundamental fairness, as providing a district judge with flexibility and discretion in considering whether bail should be granted in these extradition cases."). *But see 1983 Hearings*, *supra* note 110, at 36 (statement of Richard Olsen, Deputy Assistant Attorney General, Criminal Division, Department of Justice) ("The Courts have applied this special circumstances test wisely, and we have very seldom been placed in the position of being unable to deliver up a fugitive whose surrender has been ordered. . . . [T]he special circumstances test has worked well in practice . . . .").

'special circumstances' are required in order to justify bail in an extradition case."[123] Despite this confusion, "special circumstances" remains the operative standard (or, at least, pair of buzzwords) for bail in international extradition cases. While a precise definition may be elusive, for circumstances to be special they must be outside the realm of qualities that all defendants share.[124] Therefore, circumstances such as the need to consult with an attorney,[125] the discomfort of confinement,[126] or even the fact that the defendant's family and business depend on him[127] are not deemed special.

1. Special Circumstances and Risk of Flight

The first discernible trend in the case law is the treatment of risk of flight as a separate inquiry from consideration of special circumstances, perhaps because it would be a contorted argument for a judge or advocate to advance that although the defendant may flee, special circumstances warrant his release. Although a few courts include flight risk in the determination of special circumstances, the general agreement is that the establishment of a low risk of flight is a threshold inquiry that precedes a court's consideration of special circumstances.[128]

At its heart, the presumption against bail in extradition cases results from assumptions regarding extraditees' tendency to flee:

> [The] vast majority of [fugitives from justice in foreign countries] fled from those countries knowing that charges had been, or were likely to be, brought against them. Thus the typical subject of an extradition request has a demonstrated propensity to flee rather than face charges, and in general is likely to continue his flight if released pending extradition.[129]

Indeed, extradition hearings would not even begin if the accused were willing to submit to trial in the requesting country.[130] The

[123] Parretti v. United States, 112 F.3d 1363, 1386 (9th Cir. 1997) (Reinhardt, J., concurring).

[124] *See In re* Smyth, 976 F.2d 1535, 1535–36 (9th Cir. 1992); *In re* Morales, 906 F. Supp. 1368, 1373 (S.D. Cal. 1995) ("Special circumstances need to be extraordinary and not factors applicable to all defendants facing extradition.") (citations omitted).

[125] *See, e.g., In re* Russell, 805 F.2d 1215 (5th Cir. 1986); United States v. Glantz, No. 94 Crim. Misc. #1, 1994 WL 168019 (S.D.N.Y. Apr. 29, 1994); United States v. Hills, 765 F. Supp. 381 (E.D. Mich. 1991); Koskotas v. Roche, 740 F. Supp. 904 (D. Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1991).

[126] *See In re* Klein, 46 F.2d 85 (S.D.N.Y. 1930).

[127] *See Russell*, 647 F. Supp 1044 (S.D. Tex.), *aff'd*, 805 F.2d 1215 (5th Cir. 1986).

[128] *See* Salerno v. United States, 878 F.2d 317, 318 (9th Cir. 1989); United States v. Taitz, 130 F.R.D. 442, 445 (S.D. Cal. 1990); *Russell*, 647 F. Supp. at 1049.

[129] *See 1983 Hearings, supra* note 110, at 36 (statement of Richard Olsen, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

[130] Judge Stephen Reinhardt makes an interesting argument regarding the evolution of extradition case law since *Wright*:

> Today, foreign extradition cases as a whole may continue to present somewhat of a greater risk of flight than cases involving run-of-the-mill domestic crimes; however, the differences between the two classes of cases are no longer as significant, and the number of potential extraditees who are not flight risks is proportionally far greater than a

implication, however shaky it might be empirically, is that extradition hearings cannot be governed by the same laws as normal criminal trials since the defendant has proven to be skilled at and willing to evade justice. Moreover, as noted above, the stakes are higher in an extradition proceeding since the accused, if he does flee when granted bail, casts doubt on the ability of the United States to deliver up future criminals and to abide by its extradition treaties. In turn, the United States may be less able to capture and bring to justice those who flee from its jurisdiction, since treaty partners may then evince a lack of vigilance in delivering up future fugitives from our laws.

2. *Frequent Examples of Special Circumstances*

a. *Length of Detention*

Perhaps the most frequently advanced "special circumstance" is that the prisoner has been or will be confined for an extremely long period of time. Though detention for the period of provisional arrest is statutorily limited to ninety days[131] and sometimes limited further by treaty,[132] some extraditees have been confined for as long as three years prior to their extradition hearing.[133] While there exists no right to speedy extradition,[134] the idea that a person who does not pose a flight risk might be detained for years before trial is seriously at odds with the United States' general rule of offering pretrial liberty to the accused. Often, the "possibility of delay" argument is used to suggest that there are unique legal issues surrounding the extraditability of the accused—issues of first impression or complexity that will require more time to resolve.[135]

> century ago. . . . Given the substantially changed conditions, the prediction in *Wright v. Henkel* that potential extraditees will not normally qualify for bail is far less reliable than it was when originally offered.

Parretti v. United States, 112 F.3d 1363, 1388–90 (9th Cir. 1997) (Reinhardt, J., concurring).

131 *See* 18 U.S.C. § 3187 (1994).

132 *See, e.g.*, Treaty on Extradition, Jan. 21, 1972, U.S.-Arg., art. 12, 23 U.S.T. 3501, 3513–14, (providing for 45-day limit on provisional arrest).

133 Prior to their bail hearing, three defendants accused of being members of the Provisional Irish Republican Army who broke out of the Maze prison in a deadly prison riot were confined for three and a half, three, and two years respectively. *See In re* Kirby, 106 F.3d 855, 863 (9th Cir. 1997). As in many extradition cases, however, the government attributed the delay to the defendants, who in this case requested the delay of their trial until the conclusion of the extradition process of a co-conspirator in the Maze breakout. *See id.* (citing *In re* Smyth, 976 F.2d 1535 (9th Cir. 1992)); *see also In re* Howard, 996 F.2d 1320 (1st Cir. 1993) (21-month detention), Koskotas v. Roche, 931 F.2d 169, 171 (1st Cir. 1991) (detention for 20 months from date of arrest to extradition order); Kin-Hong v. United States, 957 F. Supp. 1280, 1284 (D. Mass. 1996), rev'd, 110 F.3d 103 (1st Cir. 1997) (detention for more than one year while awaiting extradition hearing).

134 *See* Martin v. Warden, 993 F.2d 824, 828–29 (11th Cir. 1993) ("[T]here is no Sixth Amendment right to a speedy trial in extradition cases."). *But see In re* Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960) ("[T]he accused has not been afforded a speedy trial, and . . . extradition should be denied on that ground. . . ."). *See generally* Kathleen F. Elliott, *Comment: Constitutional Law—Extradition—No Due Process Right to a Speedy Extradition*, 18 SUFFOLK TRANSNAT'L L. REV. 347 (1995) (discussing relationship between constitutional speedy trial guarantees and extradition cases).

135 *See, e.g.*, United States v. Kin-Hong, 83 F.3d 523 (1st Cir. 1996) (noting that reversion of Hong Kong to China might create unique legal issues resulting in a protracted extradition proceeding); United States v. Smyth, 795 F. Supp. 973 (N.D. Cal.), *rev'd*, 976 F.2d 1535 (9th Cir.

Of course, there is no fixed length of confinement that automatically gives rise to a special circumstance. The standard (to the degree that there is one) seems to rest more on the assignment of fault to prosecutors than to be an actual measure of time elapsed. If the government seeking the extradition or those prosecuting the case are lazy and slow about bringing the case to a hearing, delay might constitute a special circumstance. In an oft-cited passage on this issue, the district court in *McNamara v. Henkel* declared: "When the examination day comes and the complainant is not ready to proceed after having had a reasonable opportunity to communicate with the region from whence the request for extradition emanated, it is then time enough to ask for bail."[136]

b. Dangers to Health Posed by Detention

Though health problems may be one of the most frequently advanced "special circumstances," few courts, including the Supreme Court in *Wright v. Henkel*, have found it to be sufficiently "special" to warrant a grant of bail. Nevertheless, those courts who have rejected these claims do so while admitting that health would be a special circumstance if the prisoner could actually prove that the prison facilities could not accommodate his needs.[137] "Discomfort with confinement"[138] or any other pain or stress normally associated with being locked up will not even approach the level of a special circumstance. At the very least, the defendant must show that his health has deteriorated or will deteriorate because of confinement.[139]

c. "Character" of the Extraditee

The "character" of the extraditee or even the nonviolent nature of the crime for which he is accused[140] are not considered special circumstances. Many of the fugitives extradited from the United States are sought on financial crimes and are likely to pose little threat to the

1992) (noting that Article 3(a) of the Supplementary Treaty between the United States and United Kingdom presented difficult problems regarding whether the accused was being prosecuted on account of his religion).

136 McNamara v. Henkel, 46 F.2d 84 (S.D.N.Y. 1912).

137 *See In re* Hamilton-Byrne, 831 F. Supp 287, 290 (S.D.N.Y. 1993) (holding that a "health emergency . . . only [treatable] while a detainee was on bail" could justify release). "Were health problems a basis for release, both actual and feigned illnesses could rapidly empty custodial facilities." *Id.* at 290–91.

138 *In re* Klein, 46 F.2d 85 (S.D.N.Y. 1930).

139 *See In re* Rouvier, 839 F. Supp. 537, 541 n.9 (N.D. Ill. 1993); *In re* Nacif-Borge, 829 F. Supp. 1210, 1217 (D. Nev. 1993) (rejecting claims of lack of adequate exercise and specialized diet, especially since no documented medical evidence from a physician was provided) (citing United States v. Kidder, 869 F.2d 1328, 1330–31 (9th Cir. 1989) (noting that "to avoid incarceration defendant 'must show that *no* constitutionally acceptable treatment can be provided while he is imprisoned'")).

140 *See Nacif-Borge*, 829 F. Supp. at 1220 ("[T]he court can envision no situation in which the underlying offense itself would justify release on bail. The nature of the underlying offense, however, is a factor in evaluating risk of flight."); *In re* Siegmund, 887 F. Supp. 1383 (D. Nev. 1995).

community if released on bail.[141] Courts may, however, use the information about the particular defendant and his alleged crime in calculating his propensity to flee.[142] In the one case frequently cited by extraditees seeking bail based on "character," the court granted bail to a defendant who was seventeen years old at the time of his provisional arrest (sixteen when he allegedly committed robbery in Hong Kong). In doing so, the court made only passing reference to the defendant's "age and background along with a lack of any suitable facility in which [he] could be held."[143]

d. Availability of Bail to Similarly Situated Defendants at Home or Abroad

In an effort to bring some consistency to this otherwise convoluted area of U.S. international law, judges will sometimes look at the bail determinations in cases related, temporally or geographically, to the one before them at the time. Three claims are frequently advanced: (1) that the country seeking the defendant's extradition would grant him bail if he were arrested on the same charge at home;[144] (2) that the country has a policy of granting bail to those it certifies as extraditable;[145] or, (3) that the defendant's co-conspirators were released on bail by a U.S. judge for the same crime, and therefore the injustice that would result from disparate treatment constitutes a special circumstance.[146]

141 Approximately one-third of the extradition cases in the United States involve white collar crime, another third involve narcotics charges and the final third involve violent crimes. *See 1983 Hearings*, *supra* note 110, at 34–35 (statement of Richard Olsen, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

142 *See Nacif-Borge*, 829 F. Supp. at 1220.

143 Hu Yau-Leung v. Soscia, 649 F.2d 914, 919 (2d Cir. 1981).

144 *See, e.g., In re* Morales, 906 F. Supp. 1368, 1376 (S.D. Cal. 1995) (noting that fraud is a bailable offense in Mexico, and therefore a potential extraditee accused of fraud, given other special circumstances of the case, should be granted bail); *Nacif-Borge*, 829 F. Supp. at 1221 ("The availability of bail under the law of Mexico [for the tax charges brought against him] entitles Nacif to bail pending extradition if he is not a risk of flight or danger to others."). For some reason, the court in *Nacif-Borge*, like many others, cited In re *Gannon*, 27 F.2d 362, 363 (E.D. Pa. 1928) for this proposition, despite that court's failure to rely on the special circumstances doctrine articulated in *Wright* 25 years earlier. The *Gannon* decision seemed only to pay attention to flight risk in deciding to grant the defendant bail, and even went so far as to compare the risks of flight from confinement to those of bail jumping. *See id.* at 363–64 ("The prisoner may jump his bail, but so likewise he may escape from his jailers."). The *Gannon* court only made a small reference to the high "regard for liberty" shared by the United States and Great Britain—nothing approaching a finding of special circumstances was made. *See id.* at 364. The court also took note of the fact that the crime of "obtaining money under false pretenses" was bailable in both Pennsylvania and Great Britain. *Id.* at 362; *see Rouvier*, 839 F. Supp. 537, 540 (N.D. Ill. 1993) (finding that the "Gannon Court's rule conflicts with federal law . . . .").

145 *See Morales*, 906 F. Supp. at 1376 (finding that a similarly situated Mexican extraditee would be granted bail on the same charge); United States v. Taitz, 130 F.R.D. 442, 447 (S.D. Cal. 1990) (finding that South Africa would grant bail to a U.S. extraditee on a similar charge); *cf. Nacif-Borge*, 829 F. Supp. at 1220. *But see Rouvier*, 839 F. Supp. 537 (N.D. Ill. 1993).

146 *See, e.g., In re* Kirby, 106 F.3d 855 (9th Cir. 1997); United States v. Williams, 480 F. Supp. 482 (D. Mass. 1979), *rev'd*, 611 F.2d 914 (1st Cir. 1979). The logic underlying this "special circumstance" is obvious, so no further discussion is necessary here except to note that this "derivative special circumstance" has a snowball effect on the development of the common law. Errors of one judge, out of fairness, become repeated by another. This situation is highlighted by *Kirby*, where the district court granted bail based on the defendants' parity with the defendant in the

Unlike the preceding list of special circumstances, which one might characterize as motivated by mercy, these three are motivated by a sense of equal treatment. The judicial inquiry itself involves much work for the advocates and judge in the short period of time usually preceding a bail hearing. As one court observed when rejecting such an inquiry, applying the rule "would also force courts to make searching reviews of foreign laws to determine whether bail is appropriate for a given defendant in a given country for a given offense."[147] Similarly, the rule might "cut both ways" in that those fugitives from countries that do not provide bail, either for extraditees generally or for domestic criminals such as the accused, might then be confined based on the almost arbitrary fact of the country seeking them. It is also ironic that a rule intended to treat like cases the same might end up leading to a strange jurisprudence in the United States where accused murderers, for example, from different countries would be treated differently based on the protections accorded to criminal defendants in the judicial systems from which they escaped.

Defenders of such a rule, however, might point to the variability inherent in extradition law, which itself is based on a myriad of different treaties. Each treaty may differ in the time allowed for confinement pursuant to provisional arrest, the types of crimes that are extraditable, or other aspects of procedure for the delivery of the accused. Every extradition case necessarily forces the judge to examine the relevant treaty to make sure that the proper law is being enforced. Moreover, extradition treaties and the law derived from them are founded on a sense of reciprocity: mutual agreement between governments that certain procedures should be applied for a given set of circumstances.

e. Probability of Success Against the Underlying Charge

More than any of the frequently advanced claims discussed in this Part, this final special circumstance provides knotty problems for the common law of extradition. The claim made by defendants in such cases—that there is insufficient cause to believe that the defendant committed the alleged crimes—is not dissimilar to that discussed in the provisional arrest context.[148] There are really two versions of this argument. The first contends that the defendant is likely to beat the charges

case of *United States v. Smyth*, 795 F. Supp. 973 (N.D. Cal. 1992), which was later overruled by an appellate court that found the special circumstances test to be misapplied by the district court. *See In re* Smyth, 976 F.2d 1535 (9th Cir. 1992). The motivation behind such a rule, presumably, is to strive to achieve as much consistency as possible between cases as they appear before U.S. extradition judges.

147 *Rouvier*, 839 F. Supp. at 541; *see also In re* Siegmund, 887 F. Supp. 1383, 1387 (D. Nev. 1995) ("[T]he concern in an international extradition case is not to mirror the internal bail practices of the requesting country, but, rather, to deliver the extraditee to that country if the conditions precedent to extradition . . . are satisfied.").

148 The most frequently cited case for this argument is *Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989), but the panel in that case rejected appellant's claim that he had a high probability of succeeding on the ultimate extradition charge. The tendency of courts to cite this case for this proposition is just one more example, similar to *Wright*, of the strange development of the common law in this area. Most "special circumstances" begin as rejected arguments in early decisions, but their viability is granted either explicitly or implicitly by the reviewing court and later applied by an extradition judge searching for a justification to grant bail.

against him in his home country once he is extradited to face trial there. The second suggests that the defendant will actually prove himself to be nonextraditable (i.e., that there is not probable cause to believe that he committed the crimes or that somehow his case does not fall within the terms of the applicable treaty in either form or substance[149]). Under both versions, prisoners attempt to transform the bail hearing into a proceeding not unlike the general hearing to certify the defendant as extraditable.

As warned above, the bail hearing allows for potentially three hearings, the substance of which no court has differentiated. At the stage of provisional arrest (if the Ninth Circuit panel in *Parretti* has its way),[150] the decision on bail, and the general extradition hearing, the alleged fugitive will seek to prove that there is not probable cause that he committed the crimes in the country requesting his extradition. In one sense, this seems similar to a criminal trial; if the defendant can disprove the existence of probable cause, he can, *a fortiori*, prove his innocence. The difference in the extradition context, however, is that probable cause is *the issue* to be proven—once the judge rules there is probable cause (i.e., "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty"), then "he shall issue his warrant for the commitment of the person . . . until such surrender shall be made."[151] In a criminal trial, proving probable cause is merely the first step toward the conclusion of the proceedings; in extradition hearings, it is, according to the statute, the last.[152]

149 *Cf. In re* Mainero, 950 F. Supp. 290, 294–95 (S.D. Cal. 1996) (rejecting defendant's claim that he would prevail at the extradition hearing based on a lack of "dual criminality"—i.e., that the charges brought against him by Mexico were not criminal in the United States and therefore not extraditable crimes).

150 *See supra* notes 50–54 and accompanying text.

151 18 U.S.C. § 3184 (1994). *See generally In re* Lui, 913 F. Supp. 50, 55 (D. Mass.), rev'd, United States v. Kin-Hong, 926 F. Supp. 1180 (D. Mass. 1996), rev'd, 83 F.3d 523 (1st Cir. 1997):

> Aside from its possible impact on the risk of flight inquiry, there is no reason why likelihood of success should be taken into account at the detention stage of the extradition case. The fact that a person has a potentially winning defense to extradition does not make confinement any more of a hardship than it is for any other detainee. At most, it increases the probability that, at the end of the process, the accused will have prevailed, making his or her confinement that much more regrettable than it would otherwise have been. But that by no means suggests that the detention would have been in vain . . . .

Id. at 55.

152 This confusion came to the fore in *In re* Morales, 906 F. Supp. 1368, 1370 (S.D. Cal. 1995). The magistrate observed:

> [I]f he were to find that Morales never in fact possessed the crane [he allegedly stole], then Morales could not be extradited, because there would not be probable cause to believe that he had committed the offense for which he had been charged. With respect to ruling on this issue for purposes of determining Morales' eligibility for bail, Judge Moskowitz pointed out that . . . it would make more sense to simply move up the date of the extradition hearing rather than to hold protracted bail hearings on a dispositive issue.

Id. (citations omitted).

Most courts examining the issue seem to adhere to principles similar to those applied in the context of preliminary injunctions[153] or habeas appeals.[154] Rooted once again in a notion of fairness—that it would be unjust to detain someone who is either innocent or unlikely to be extradited—the courts will sometimes perform an investigation quite similar to that of a general extradition proceeding. If the judge rules that there is a high probability of success on the merits of the extradition case, the government may seek the issuance of a new warrant (perhaps before a different judge) for the accused with more specific evidence or different charges brought by the demanding government.[155] As noted above, neither res judicata nor protections against double jeopardy attach in extradition hearings, so repeated prosecution or even multiple attempts by the government to detain the accused pending his hearing are not constitutionally barred.[156]

Though the vocabulary used in these cases is quite sloppy, there are subtle differences in the inquiries at each stage of the extradition process. In the bail determination prior to hearing, the extradition judge assesses whether there is a good chance that the defendant will disprove probable cause to extradite. The defendant will not only attempt to cast significant doubt on his guilt,[157] but will also try to take advantage of some defenses inherent in the common law of extradition or in particular treaty provisions. At the bail hearing, he may, for example, suggest that he is being prosecuted for a political crime,[158] or argue that the charged offense is not a crime in the United States.[159] Or he may suggest that the extradition statute is constitutionally infirm, thus guaranteeing acquittal in the ultimate extradition hearing.[160] All these defenses

153 *See, e.g.*, Alan A. v. Verniero, Civ. Act. No. 97-1288, 1997 U.S. Dist. LEXIS 10433, at *39 (D.N.J. June 27, 1997) (citing, *inter alia*, ACLU v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1477 n.2 (3d Cir. 1996)) (discussing the reasonable probability prong of the test for dissolving preliminary injunctions).

154 *See, e.g.*, Calley v. Callaway, 496 F.2d 701, 702 (5th Cir. 1974) (requiring a high probability of success for the constitutional claims raised on habeas for the petitioner to be released on bail). The opinion of the Ninth Circuit panel in *Salerno v. United States* cited *Aronson v. May*, 85 S. Ct. 3 (1964) (finding lack of special circumstances warranting release or a grant of bail in a non-extradition habeas case) for the proposition that "probability of success" is a special circumstance in the realm of extradition law. *See Salerno*, 878 F.2d 317 (9th Cir. 1989).

155 *See* Hooker v. Klein, 573 F.2d 1360, 1365–68 (9th Cir. 1978).

156 *See* Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir. 1986); *Hooker*, 573 F.2d at 1365–68.

157 *See, e.g.*, *Morales*, 906 F. Supp. 1368, 1370 (S.D. Cal. 1995).

158 *See, e.g.*, *In re* Kirby, 106 F.3d 855 (9th Cir. 1997); *In re* Mackin, 668 F.2d 122 (2d Cir. 1981); Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952), rev'd *sub nom.* United States v. Smyth, 795 F. Supp. 973 (N.D. Cal.), rev'd, 976 F.2d 1535 (9th Cir. 1992); Ivancevik v. Artukovic, 211 F.2d 565 (9th Cir. 1954); *cf.* United States v. Glantz, No. 94 Crim. Misc. #1, 1994 WL 168019 (S.D.N.Y. Apr. 29, 1994) (arguing unsuccessfully that the government's improper motivation for seeking extradition should constitute special circumstance).

159 *See supra* note 56 (discussing the rule of "double criminality"); *see also* Factor v. Laubenheimer, 290 U.S. 276 (1933) (explaining the law of dual criminality); BASSIOUNI, *supra* note 6, at 388–93.

160 This last defense was used successfully in Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), *vacated as moot*, 82 F.3d 1081 (D.C. Cir. 1996). *See supra* note 12, describing the *Lobue* court's finding that 18 U.S.C. § 3184 (1994) is unconstitutional on separation of powers grounds. However, this defense has not been used successfully since *Lobue*. *See* Kin-Hong v. United States, 926 F. Supp. 1180 (D. Mass. 1996); *In re* Sutton, 898 F. Supp. 691 (E.D. Mo. 1995); Cherry v. Warden, No. 95 Crim. Misc. #1 P. 7, 1995 WL 598986 (S.D.N.Y. Oct. 11, 1995).

are available irrespective of the validity of the underlying charge, and if the defendant can prove a high probability of prevailing at trial, the court may find that special circumstances warrant the defendant's release.

V. ALTERNATIVES AND PROPOSALS

Congress has made two unsuccessful attempts to bring order to the confusion of bail in extradition matters.[161] The recent cases of In re *Kirby*[162] and *Parretti v. United States*[163] and the five separate opinions they produced make clarifying legislation even more important today than it was fifteen years ago. The same may be said for the importance of direction from the Supreme Court. But unless the Court grants certiorari in *Parretti* before the issue is mooted by a decision in the underlying extradition hearing, we will once again be left in the dark as to whether the Court's decision in *Wright* is still viable, and what the special circumstances test might mean for an age of international transportation and crime inconceivable at the turn of the century.

The legislation regarding bail in extradition matters that was proposed in the early 1980s would have taken one of two routes towards this clarification. One option, presented in a House bill, would have made the bail inquiry in extradition matters quite similar to that in other legal contexts: H.R. 2643 would have lifted language from the bail statutes to focus the extradition judge's determination on the potential extraditee's risk of flight or danger to the community.[164] It also would have allowed for appeals by both the extraditee and the government of bail decisions and of extradition orders generally.[165]

The Senate version took a completely different approach. Though it also allowed for symmetrical rights of appeal for the fugitive and the government,[166] it merely codified the existing law by providing that "[t]he court shall order . . . official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release."[167] At least this version would have preempted the confusion now caused by the ruling in *Parretti* (though the constitutional underpinnings of the majority opinion would trump the statute). But as one witness testifying at the hearings on the bill suggested, "Special circumstances have been the source of a great problem in judicial interpretations applying this standard."[168] So why

161 *See* Extradition Act of 1983, H.R. 2643, 98th Cong. (1983); Extradition Act of 1981, S. 1639, 97th Cong., 1st Sess., (1981).

162 106 F.3d 855 (9th Cir. 1996).

163 112 F.3d 1363 (9th Cir. 1997).

164 H.R. 2643, 98th Cong., § 3199(c) (1983).

165 *Id.* §§ 3195, 3199(c)(5).

166 Extradition Act of 1981, S. 1639, 97th Cong., 1st Sess., § 3195(a) (1981).

167 *Id.* § 3192(d).

168 *1981 Hearings*, *supra* note 3, at 22 (statement of Prof. M. Cherif Bassiouni, School of Law, DePaul University) (suggesting a standard that considered criteria such as "the nature of the

not use the legislation to clarify, rather than codify, the current confusion, he asked.

At least for the judges seeking guidance as they hear bail cases, either piece of legislation would have been preferable to the current regime. One other virtue of either version of extradition reform would be a clarification of the judge's role in extradition matters. Part of the confusion surrounding appealability of bail decisions, or the source of the authority for an extradition judge's grant of bail, is rooted in the ambiguous (or *sui generis*) position of the extradition judge. Were the resources available, perhaps the greatest contribution Congress could make is to create a formal role of an administrative judge in charge of extradition matters—something along the lines of INS officers and a Board of Immigration Appeals for extradition cases. As extradition judges consider habeas petitions and make findings regarding bail, they are continually putting on and taking off their Article III robes. The present situation, in which district judges are essentially co-opted by the Secretary of State to hear extradition matters while leaving the trappings of constitutional procedures behind, creates an ambiguous role for the man or woman who is one day a member of the executive branch and is a federal judge the next—sometimes during the same case.

The special circumstances test as currently conceived (or misconceived) must be completely reformulated. If the court wishes to remain true to the dictum in *Wright*, it should do so by combining the "risk of flight" inquiry with the weighing of special circumstances. The strong presumption against bail should remain, and the alleged fugitive should bear the burden of proving that he poses no risk of flight (or that certain sureties or other methods can completely guarantee his appearance at each stage of the hearing). In order to rebut this presumption, the fugitive ought to have the opportunity to show "special circumstances," but the extradition judge should only consider circumstances *special* if they bear on the risk of flight. In other words, a fugitive's health or character, the nature of the crime for which he is sought, or the need to participate in civil litigation are only *special* circumstances if they somehow guarantee the presence of the fugitive at each stage of the extradition proceeding. Moreover, the presumption against bail should increase through each stage of the extradition process. As the process moves forward, the fugitive hears the footsteps of the requesting government and naturally becomes more likely to flee. As the day of reckoning when the fugitive is taken in handcuffs on a plane to the requesting country inches ever closer, the likelihood of granting bail under any circumstances, no matter how special, should become even more remote.

VI. CONCLUSIONS

As easy as it may be to pummel the system currently in force, one cannot help but marvel at the staying power both of the extradition

offense charged; the dangerousness of the relater; the existence of probable cause on the face of the record; the safety of witnesses or other persons involved").

statute and the standard articulated in *Wright v. Henkel.* Few judicial or legislative innovations, let alone any dealing with a legal issue whose character would appear to change significantly over time, have lasted a similar period. Though we may be stuck with this amorphous standard born from the dictum in a decision almost a century old, at least as measured by the U.S. government's ability to fulfill its international commitments, the standard still seems to work.

The question, as the recent decisions discussed in this paper suggest, is whether during this passage of time between *Robbins* and *Wright* and *Parretti,* we have begun to place a higher value on guaranteeing pretrial liberty for the accused, and where does that value stand in relation to our willingness to risk breaching our treaty obligations. As easy as it is to attack the judicial activism of current judges who (1) find new rights for extraditees in the Constitution, (2) offer a right of governmental appeal where none exists in the law, or (3) extend the list of special circumstances beyond the bounds of any coherent theory, the complicated context posed by bail decisions in extradition cases almost forces some kind of judicial innovation in the balancing of competing interests.

At its most basic level, the battle lines are drawn between the rights of a single individual to be free from restraint and the rights of governments to an assurance that they will be able to enforce their own laws against those who flee from their jurisdiction. In the middle sits the extradition judge, who canvasses the case law and finds few concrete answers but plenty of justifications for possible opinions. The confusion and inconsistency of the common law of bail in extradition proceedings is a product of the extradition judge's difficult position—as to both the definition of the judge's role and the extent of the court's authority. The flexibility of the common law is, ironically, the extradition judge's salvation. The common law allows the judge to adapt the century and a half of American experience with extradition matters to new treaties, new technologies, and new threats, while at the same time weighing in the evolving importance society places on the individual's right to pretrial liberty.

APPENDIX

Case: Underlined names indicate a bail hearing subsequent to a finding of extraditibility. Italicization indicates the proceeding was heard pursuant to a writ of habeas corpus. Appellate cases are organized by circuit, and district court cases are listed chronologically. The subsequent history is omitted.

Bail Granted?: Did the court grant the defendant pre-hearing release?

Flight Risk?: Did the court consider the defendant a flight risk?

Special Circumstances: Claims accepted by the court appear in italics.

CASE	BAIL GRANTED?	FLIGHT RISK?	SPECIAL CIRCUMSTANCES
U.S. v. Williams, 611 F.2d 914 (1st Cir. 1979)	N		Appellee's brother released on bail
U.S. v. Kin-Hong, 83 F.3d 523 (1st Cir. 1996)	N		1. Complexity of legal issues 2. Expected reversion of Hong Kong 3. Likelihood of delay
Hu Yau-Leung v. Soscia, 649 F.2d 914 (2d Cir. 1981)	Y		*1. Age (16)* *2. Background of defendant* *3. Lack of any suitable facility to hold him*
U.S. v. Leitner, 784 F.2d 159 (1st Cir. 1986)	N	N	1. Lack of prior record 2. Family ties to United States
In re Russell, 805 F.2d 1215 (5th Cir. 1986)	N	Y	1. Complexity of proceedings 2. Severe financial and emotional hardship for self and family 3. Civil litigation in need of defendant's attention
Salerno v. U.S., 878 F.2d 317 (9th Cir. 1989)	N	N	
In re Smyth, 976 F.2d 1535 (9th Cir. 1992)	N		Need to consult with counsel and gather witnesses
In re Kirby, et al., 106 F.3d 855 (9th Cir. 1996)	Y		1. Will not get credit for time spent in U.S. custody when tried in host country *2. Parity with other defendant on similar charge* *3. Granting bail would promote harmony among factions in Northern Ireland dispute* *4. Likelihood of delay* *5. Pending constitutional challenge to the extradition statute*
Parretti v. U.S., 112 F.3d 1363 (9th Cir. 1997)	Y		*1. Special circumstances standard is unconstitutional* *2. Only flight risk should be considered in pre-hearing detention*
In re Mitchell, 171 F. 289 (S.D.N.Y. 1909)	Y		*Need to participate in litigation upon which entire fortune depended*
McNamara v. Henkel, 46 F.2d 84 (S.D.N.Y. 1912)	N		Likelihood of delay

In re Gannon, 27 F.2d 362 (E.D. Pa. 1928)	Y		*1. Likelihood of delay* *2. Bailable offense in country seeking extradition*
In re Klein, 46 F.2d 85 (S.D.N.Y. 1930)	N		1. Discomfort of jail 2. Likelihood of delay
Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952)	Y	N	1. World in turmoil during time of offense that was committed by defendant during army service *2. Lack of a direct charge in the complaint* *3. No concealment of his identity* *4. Defendant had wife and four children in United States*
Beaulieu v. Hartigan, 430 F. Supp. 915 (1977)	Y	N	Special circumstance doctrine for totality of circumstances test including: 1. Parents seemed to be responsible people who assured son's presence at trial 2. Accused had no passport and posed no danger to the community *3. Likelihood of delay*
In re Kaplan, Civ. No. 79-1119 RF, slip op. (C.D. Cal. July 19, 1979)	Y		Risk to defendant's health
In re Itaka, Misc. No. 79-1536-M, slip op. (D.N.M. Dec. 17, 1979)	Y		*Third party wholly dependent on defendant*
U.S. v. Williams, 480 F. Supp. 482 (D. Mass. 1979)	Y	N	*1. Provisional arrest justifies grant of bail* *2. Disparity with treatment of persons on same charge*
U.S. v. Kamrin, No. 81-151M-01 (W.D. Wa. Dec. 10, 1981)	Y	N	Issues of extreme complexity and first impression
U.S. v. Messina, 566 F. Supp. 740 (E.D.N.Y. 1983)	N	Y	Likely to succeed once prosecuted for the underlying charge
U.S. v. Leitner, 627 F. Supp. 739 (E.D.N.Y. 1986)	N	Y	
In re Russell, 647 F. Supp. 1044 (S.D. Tex. 1986)	N	Y	1. Complexity of charge 2. Family is economically dependent on defendant 3. Would lose large amount of business 4. Civil litigation in need of defendant's attention
U.S. v. Tang Yee-Chun, 657 F. Supp. 1270 (S.D.N.Y. 1987)	N	Y	Difficulty of defending in extradition case because of need for translator
U.S. v. Spatola, 1989 WL 126771 (E.D.N.Y. 1989)	N	Y	Already served a prison sentence for certain act alleged in arrest warrant
In re Koskotas, 127 F.R.D. 13 (D. Mass. 1989)	N		1. Need to launch pro se civil suit 2. Need to be actively involved in defense on extradition charge

In re Alfie-Cassab, No. 89-2493M (S.D. Cal. July 5, 1989)	Y		*Deprivation of religious practice while incarcerated*
U.S. v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990)	Y	N	*1. No danger to community* *2. Religious observance (Orthodox Jew)* *3. Lack of diplomatic necessity for confinement* *4. Likelihood of delay* *5. Risk to defendant's health* *6. Other country's extraditees get bail*
Koskotas v. Roche, 740 F. Supp. 904 (D. Mass. 1990)	N		1. Need to launch pro se civil suit 2. Need to be actively involved in defense on extradition charge 3. Willingness to submit self to house arrest 4. Civil litigation in need of defendant's attention
U.S. v. Hills, 765 F. Supp. 381 (E.D. Mich. 1991)	N	N	1. Need to consult with attorney 2. Civil litigation in need of defendant's attention
In re Heilbronn, 773 F. Supp. 1576 (W.D. Mich. 1991)	N	Y	1. Release would benefit the public because defendant is a doctor 2. Likelihood of delay
U.S. v. Smyth, 795 F. Supp. 973 (N.D. Cal. 1992)	Y	N	*Unique need to consult with counsel and communicate with witnesses from Ireland*
In re Nacif-Borge, 829 F. Supp. 1210 (D. Nev. 1993)	Y	N	1. Timing of provisional arrest (while accused was on vacation) 2. Good faith effort to resolve underlying charge 3. Underlying crime was economic/tax-based 4. Likelihood of delay 5. Risk to defendant's health 6. Likely to succeed once prosecuted for the underlying charge 7. Other country's extraditees get bail 8. Character of Defendant 9. *Bailable offense in country seeking extradition*
In re Hamilton-Byrne, 831 F. Supp. 287 (S.D.N.Y. 1993)	N	Y	Risk to defendant's health
In re Rouvier, 839 F. Supp. 537 (N.D. Ill. 1993)	N		1. Risk to defendant's health 2. Likely to succeed once prosecuted for the underlying charge 3. Bailable Offense in country seeking extradition
In re Sidali, 868 F. Supp. 656 (D. N.J. 1994)	N	Y	1. Likely to succeed once prosecuted for the underlying charge 2. Character of Defendant

U.S. v. Glantz, 1994 WL 168019 (S.D.N.Y. 1994)	N	N	1. Need to consult with attorney 2. Need to attend to business 3. Improper motivation for extradition request 4. Likelihood of delay 5. Risk to defendant's health 6. Civil Litigation in need of Defendant's attention
In re Siegmund, 887 F. Supp. 1383 (D. Nev. 1995)	N		1. Nonviolent nature of underlying offense 2. Bailable offense in country seeking extradition
In re Sutton, 898 F. Supp. 691 (E.D. Mo. 1995)	N		1. Bailable offense in United States 2. Pending constitutional challenge to the extradition law 3. Bailable offense in country seeking extradition 4. Character of defendant
In re Morales, 906 F. Supp. 1368 (S.D. Cal. 1995)	Y	N	1. Arrest warrant was defective *2. Ability to make restitution for crime* *3. Bail would have been allowed for Mexican citizen facing extradition to United States on same charge* *4. Likelihood of delay, Bailable offense in country seeking extradition* *5. Other country's extraditees get bail*
Kin-Hong v. U.S., 913 F. Supp. 50 (D. Mass. 1996)	N	Y	1. Reversion of Hong Kong created unique questions of law 2. Likely to succeed once prosecuted for the underlying charge
Kin-Hong v. U.S., 926 F. Supp. 1180 (D. Mass. 1996)	Y	N	*1. Likelihood of delay* *2. Pending constitutional challenge to the extradition law*
In Re Mainero, 950 F. Supp. 290 (S.D. Cal. 1996)	N		
In Re Lang, 905 F. Supp. 1385 (C.D. Cal 1995)	N		
Cherry v. Warden, 1995 WL 598986 (S.D.N.Y. 1995)	N		Pending constitutional challenge to the extradition statute
Lo Duca v. U.S., 1995 WL 428636 (E.D.N.Y. 1995)	N	N	Wife's ailing health